BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	**WC Docket No. 04-36**
	)	

COMMENTS OF COMPTEL/ASCENT

Jonathan D. Lee
Sr. Vice President, Regulatory Affairs
COMPTEL/ASCENT
1900 M Street, N.W., Suite 800
Washington, DC 20036
(202) 296-6650

Robert J. Aamoth
Edward A. Yorkgitis, Jr.
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

Counsel for CompTel/ASCENT

Dated: May 28, 2004

TABLE OF CONTENTS

Page

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	**WC Docket No. 04-36**
	)	

COMMENTS OF COMPTEL/ASCENT

CompTel/ASCENT ("CompTel"), by its attorneys, hereby submits comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

CompTel applauds the Commission in instituting a proceeding to examine the appropriate regulatory treatment of applications making use of Internet Protocol (IP). The Commission's historically hands-off policy toward enhanced and information services generally has supported the development of a vast array of diverse IP-enabled applications, including voice over IP ("VoIP"). However, in large part due to the spate of state-initiated proceedings in the past couple of years, it is important for the Commission to step in and, under its jurisdictional authority over enhanced and information services, as well as the Internet-related services and applications, articulate a clear and definitive plan of minimal regulatory classification and treatment of IP-enabled applications which will ensure the continued growth of this important industry segment within the communications and information services marketplaces. In that spirit, CompTel is pleased to offer these comments in response to the *NPRM*.

---

1 *See In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (released Mar. 10, 2004) ("NPRM").

I. INTRODUCTION AND SUMMARY

This proceeding is not the first time that the Commission, as a general matter, has considered the appropriate regulatory treatment of enhanced and information service providers. Over the past few decades, IP-enabled applications have begun to flourish and mature because the Commission long ago adopted, and generally has remained true to, a hands-off policy regarding the regulation of enhanced and information service offerings. Indeed, in only the past few years, a growing number of providers are introducing IP-enabled voice applications that build upon underlying communications services by offering functionalities and capabilities that only existed as concepts in the 1990s. A marketplace environment free from regulation has been a fundamental reason for the proliferation of these types of applications and their continued innovation.

Complementing this regulation-free environment for IP-enabled offerings has been continued regulation by the Commission and state regulatory bodies of underlying network platforms, especially those of the incumbent local exchange carriers ("ILECs") which historically have operated as monopolies and continue to demonstrate significant market power and presence. The Commission should not depart from its long-standing hands-off approach toward IP-enabled applications unless it is necessary to protect consumers of and competition in telecommunications services and information services. Policies developed along these lines – rather than an approach that assumes regulation of IP-enabled applications is needed and proceeds headlong to focus on what types of regulations are "required" – will ensure that new and innovative services continue to develop, bringing additional benefits to individuals and businesses. The Commission should avoid adopting a plethora of regulatory classifications, but work principally from the fundamental categories currently in place, which promote the

channeling of resources to the good of consumers rather than to a multitude of administrative and adjudicative proceedings.

The Commission should be particularly wary of the vertical integration of underlying communications transport and facilities by dominant network providers – for example, Regional Bell Operating Companies ("RBOCs") and other ILECs – with IP-enabled applications. In the current marketplace, the Commission should shun regulatory requests and initiatives from these dominant carriers that would, in effect, remove regulation of essential underlying facilities that could harm both providers of IP-enabled applications and competitive telecommunications services.

II. THE COMMISSION SHOULD PREEMPT STATE REGULATION OF IP-ENABLED SERVICES

Historically, the Commission has employed a hands-off policy toward enhanced services, including Internet and IP-enabled applications. Inherent in its nature, this policy has been more implicit, than explicit, despite the fact that in recent years the Commission and individual Commissioners have increasingly referred to the policy. The Commission's *de facto* approach left several questions unanswered, principally as a result of IP applications increasingly being coupled with voice applications as a number of technological and service quality hurdles have been cleared. Certain entities, principally several of the RBOCs and other ILECs, have sought to exploit this situation and try to force providers of IP-enabled applications into traditional and unsuitable regulatory molds through both federal and state level filings. At a minimum, these efforts generated uncertainty, dragging down the continued development of IP-enabled applications.

In just the past several years, an increasing number of state proceedings have been instituted raising questions whether certain IP-enabled applications should continue to be treated

as information services, whether their providers should be treated as telecommunications carriers, whether the providers should have to pay access charges to local exchange carriers, and other related issues.[2] This growing cluster of state proceedings creates the specter of a patchwork of inconsistent requirements applicable to IP-enabled applications and made clear the need for a proceeding such as this. CompTel applauds the Commission for initiating it.

As a foundational step to whatever action or pronouncements the Commission might make in this proceeding, the Commission should expressly preempt the states from making any regulation or ruling regarding IP-enabled applications. The Commission has previously recognized the limited role of state jurisdictions regarding information or enhanced services, and recently affirmed that there is no reason to depart from this approach.[3] Section 230 of the Telecommunications Act of 1996 (the "1996 Act") makes clear the national policy to "preserve the vibrant and competitive free market" that exists for information services, "unfettered by Federal or State regulation."[4] To the extent that there is any future departure from the Commission's hands-off regulatory policy toward the Internet and IP-enabled applications, it should be initiated and implemented by the Commission through just such a

---

2 *See, e.g., Order Establishing Balanced Regulatory Framework for Vonage Holdings Corporation*, Case 03-C-1285 (NY PSC May 21, 2004) (requiring Vonage to obtain a certification and file a tariff for its IP-enabled voice application services and be subject to other appropriate regulations yet to be determined); *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108 (MN PUC, Sept. 11, 2003) (finding Vonage to be a telecommunications carrier and requiring compliance) *overruled by Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993-996 (D. Minn. 2003) (finding that Vonage provided information services that the FCC had occupied field, and that the Minnesota PUC was preempted). Proceedings regulating VoIP have also been commenced in California, New York, Ohio, and Pennsylvania, among other states. *See, e.g., NPRM*, ¶34 n.114.

3 *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, FCC 04-27, Memorandum Opinion and Order (Feb. 19, 2004) ¶¶ 17-18, and cases cited therein. ("pulver.com") *See also Vonage Holdings Co. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 997, 1001-02 (D. Minn. 2003).

4 47 U.S.C. § 230(b)(2).

rulemaking process as this, not by *ad hoc* state proceedings. Otherwise, there is the very real danger that piecemeal and varied regulation by the states of IP-enabled applications would undermine the national policies promoting the growth of the Internet and advanced information services. The myriad and expanding number of configurations under which IP-enabled applications are offered ensures that increasingly, the Commission's end-to-end traditional jurisdictional analysis simply does not apply, and that fewer and fewer IP-enabled applications will be "purely intrastate." Nor is it readily clear that, for IP-enabled applications, interstate and intrastate "components" could be parsed out without negating national objectives relating to the Internet and, more generally, IP-enabled applications. Rather, as the *NPRM* recognizes, an increasing number of IP-enabled offerings are non-geographically-limited, rendering any effort to subject them to a particular state's jurisdiction antithetical to the federal objectives of promoting advanced services and applications.

III. THE COMMISSION CAN BEST MEET ITS ROLE OF SAFEGUARDING THE PUBLIC INTEREST BY CONTINUING ITS ESTABLISHED POLICY OF MINIMAL REGULATION OF IP-SUPPORTED APPLICATIONS

In the FCC's *Computer Inquiries* line of decisions from the 1970s and 1980s,[5] the Commission created a distinction between basic services and enhanced services.[6] As a

---

5 *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Notice of Inquiry, 7 FCC 2d 11 (1966); *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267 (1971); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980) ("*Computer II Final Decision*"); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986) (subsequent cites omitted) (collectively the "Computer Inquiries").

6 A basic service is transmission capacity for the movement of information without net change in form or content, whereas an enhanced service contains a basic service component underlying the offering but also involves some degree of data processing that

general matter, providers of basic telecommunications services were subjected to regulation (under Title II of the Communications Act), whereas the provision of enhanced services which, in effect, added an applications layer to the underlying network platform, has been free from regulation, including certification requirements. In the Telecommunications Act of 1996 (the 1996 Act),[7] Congress codified definitions of the terms "telecommunications," "telecommunications service," and "information service."[8] Subsequently, in the Commission's, *Non-Accounting Safeguards Order*, the agency determined that the statutory term "telecommunications service" is practically synonymous with the Commission's *Computer Inquiries* definition of a basic service, and the statutory term "information service" is similar to the definition of an enhanced service.[9] The Commission found that, like basic services and enhanced services, telecommunications services and information services are separate and distinct categories, with Title II regulation applying to telecommunications services but not to information services.[10] Again, the concept of information services being an applications layer relative to communications is explicit in the definitions.[11]

Consistent with the regulatory distinctions fashioned by the Commission, and later codified by Congress, the Commission has proceeded to ensure that enhanced and

---

changes the form or content of the transmitted information. *Computer II Final Decision*, 77 FCC 2d at 419-22.

7 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

8 47 U.S.C. §§ 153(20), (43), and (46).

9 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21905, 21955-58 (1996). *See also Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11507-08, 11516-17 (1988) ("Report to Congress").

10 *Stevens Report*, 13 FCC Rcd at 11507-08.

11 An "information service" consists of "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."47 U.S.C. § 153(20) (emphasis supplied).

information services have been free not only from regulation but also from indirect treatment as telecommunications carriers. Perhaps the best known example of this policy was formulated in 1983, when the Commission first determined that enhanced service providers would be exempted from interstate access charges.[12] This exemption was granted in light of the fact that providers of enhanced services (which had an underlying communications component) were seen to be operating in a volatile and developing industry, and that such providers and the growth of advanced technologies like the Internet and IP-enabled applications generally would suffer if access charges were imposed on such offerings.

In 1998, the Commission issued a Report to Congress on Universal Service in which the Commission for the first time engaged in a tentative and preliminary discussion whether certain types of IP-enabled applications, specifically, IP-voice telephony, could be categorized "telecommunications" or "telecommunications services" under the Communications Act or whether these fell outside those categories.[13] The *Report to Congress* also tentatively entertained whether any providers of IP telephony should be subject to access charges. The Commission reached *no* definitive conclusions regarding the regulatory classifications of any type of IP telephony, observing that

> [b]ecause of the wide range of services that can be provided using packetized voice and innovative CPE, we will need, *before making definitive pronouncements*, to consider whether our tentative definition of phone-to-phone IP telephony [as telecommunications] accurately distinguishes between phone-to-phone and other forms

---

12 *MTS and WATS Market* Structure, 97 FCC 2d 682, 715 (1983). The Commission retained the exemption on two subsequent occasions over the next fifteen years. *Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2631 (1988); *Access Charge Reform,* 12 FCC Rcd 15982, 16133 (1997).

13 *Report to Congress, supra*, 13 FCC Rcd 11501. Specifically, the Commission looked at phone-to-phone IP Telephony where the protocol conversion occurred within IP gateways, and computer-to-computer IP Telephony where the protocol conversion occurred within the users' equipment.

> of IP telephony, and is not likely to be *quickly overcome by changes in technology*.[14]

In short, the Commission left unresolved basic questions regarding the regulatory categorization of all IP-enabled telephony products, maintaining its implicit "hands off" regulatory approach.[15] In doing so, the Commission also noted that technology regarding IP-enabled applications was developing so rapidly that any regulatory classifications it might venture to adopt were as likely as not to be quickly made obsolete, something the intervening six years have revealed to be prescient.

With the Commission's historical hands-off policies as a back drop, the Commission should consider completely anew what the criteria should be when establishing whether any degree of regulation of IP-enabled applications is appropriate going forward, much as suggested in the *NPRM*.[16] CompTel submits that the fulcrum for any consideration of proper treatment of IP-enabled applications consistent with national policies promoting their growth should be the Act's definition of "information services," which includes all offerings that have

---

14 *Id.* (emphasis added).

15 Recently, the Commission departed from its hands off approach for the first time, albeit in what it described as a limited ruling. At the commencement of the *Intercarrier Compensation* rulemaking, the Commission stated clearly that "IP telephony [is] generally exempt from access charges ...." *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001) ("Intercarrier Compensation NPRM"). Nonetheless, on April 21, 2004, the Commission concluded in the *AT&T VoIP Declaratory Ruling* that certain forms of IP telephony were telecommunications and subject to access charges. *Petition for Declaratory Ruling that AT&T's IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, Order (Apr. 21, 2004). CompTel believes that the *AT&T VoIP Declaratory Ruling* was wrongly decided, but does not seek review of that order here, which is subject to other requests for review. Rather, the Commission should face forward in this proceeding. As the Commission noted in the *AT&T VoIP Declaratory Ruling,* the order is interim pending this and the *Intercarrier Compensation* proceeding (CC Docket No. 01-92). The Commission should specifically conform any services found to have been subject to the interim *AT&T VoIP Declaratory Ruling* (whether or not the declaratory ruling, in the interim, remains in effect, is modified, or reversed) to the policies or regulations adopted in this rulemaking proceeding.

16 *NPRM* ¶¶ 43-44.

the "*capability* for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[17] The *presence* of such capability on all communications as part of an IP-enabled offering, *whether or not* that capability is utilized by the customer during each communication using that application, should qualify an offering as an information service. [18] Such offerings should be free from any economic regulation and, as mentioned below, any non-economic regulation should be implemented only if truly necessary to achieve clear objectives the marketplace does not foster and where such regulation falls within the Commission's grants of jurisdictional authority.

Offerings that include IP-enabled applications with what otherwise might, in isolation, arguably be a basic transmission capability should be looked at holistically, not artificially analyzed and dissected. Any analysis regarding the treatment of IP-enabled applications must look at the reasons the customer subscribes to the offering. In other words, is customer obtaining, through the IP-enabled application, a capability that supports generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications? The Commission should move toward policies or rules that provide that – except where dominant carrier regulation is required because an entity possesses market power in the provision of the transmission capabilities underlying IP enabled applications – *all* IP-enabled applications that offer the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via

---

17 47 U.S.C. § 153(20).

18 In the *NPRM*, the Commission proffers various bases for categorizing IP-enabled applications. *See NPRM* ¶37. CompTel respectfully submits that the criteria put forth for comment in the *NPRM*, by and large, are biased towards categorizing applications as telecommunications services whenever possible. The danger in considering regulation from such any such starting point is that the agency may cast such a wide net around IP-enabled applications and subject many of them to regulation such that continued growth and innovation is retarded, frustrating federal policies and offering consumers little, if any, countervailing benefit.

telecommunications should be free from entry and economic regulation in their entirety.[19] Providers of such applications should be required only to compensate the providers of underlying telecommunications functionality as end users, and should not otherwise be treated as telecommunications carriers or subjected to economic and, in most cases, "social" regulation.[20]

In the *NPRM*, the Commission asks whether the similarity of IP-enabled applications to the Free World Dialup ("FWD") service of pulver.com should be used as a benchmark for whether a service merits treatment as an information service.[21] While CompTel believes the Commission reached the right result in finding that FWD is an information service,[22] and any IP-enabled application that is "similar" to FWD should also be deemed an information service, FWD is not in any way archetypal. Many IP-enabled applications bear little resemblance to FWD, yet clearly should be treated as IP-enabled applications and information services. FWD, as the *NPRM* itself makes clear, is just the tip of a large iceberg of varied and often totally unrelated applications that offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." All such applications should be treated as IP-enabled services free from regulation.

---

19 Further, as noted above, the Commission should make clear that such applications are not subject to state regulation either except in very rare circumstances where the application is "purely intrastate."

20 As discussed below, other forms of regulation may, in certain clearly defined instances, prove appropriate.

21 *NPRM* ¶ 35.

22 *See pulver.com, supra.*

IV. ANY REGULATION IMPACTING IP-ENABLED SERVICES SHOULD BE DIRECTED TO UNDERLYING NETWORKS PROVIDED BY DOMINANT CARRIERS, NOT THE APPLICATIONS THAT DEPEND UPON THEM

In the *NPRM,* the Commission recognizes the prospect of making regulatory decisions regarding IP-enabled applications on the basis of distinctions between "(1) the underlying transmission facility, (2) the communications protocols used to transmit information over that facility, and (3) the applications used by the end user to issue and receive information."[23] Decisions based upon this type of layered approach would be sound, particularly in the context of ensuring that incumbent local exchange carriers do not leverage their persistent dominance of underlying network or transmission facilities to hamper competition among providers of IP-enabled applications. Conversely, such regulation will ensure that the adoption of VoIP and other IP-enabled applications by ILECs does not lead to the premature deregulation of their underlying network facilities used to provide retail telecommunications services, which could undermine the already precarious position of competition in telecommunications services.

For decades, the Commission has recognized the validity of regulatory distinctions based upon a network or facilities layer versus an applications layer. As suggested above, the original enhanced versus basic distinction recognized the layered nature of enhanced services versus the underlying communications component. The definition of enhanced services adopted in the *Computer Inquiry Proceedings* categorically included "services offered *over common carrier transmission facilities* . . . which employ computer processing applications" that met one of three delineated sets of criteria.[24] The more recently adopted definition of "information services," which the Commission has concluded is largely synonymous with

---

23 *NPRM* ¶ 37, p. 26.

24 47 C.F.R. § 64.702 (2000) (emphasis supplied).

enhanced services, encompasses all offerings that have the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications.*"[25]

Further, in its *Computer Inquiry Proceedings*, the Commission required the Regional Bell Operating Companies, and other ILECs, to provide enhanced services providers with nondiscriminatory access to the underlying transmission facilities when the carriers offer information services themselves.[26] This requirement, which the Commission should retain because of the continued dominance of these ILECs, recognizes the difference between the IP-enabled application or enhanced service and the underlying network facilities. It also recognizes that access by enhanced/information services providers to the underlying facilities of their competitors is necessary to promote a robustly competitive marketplace in enhanced/information services when those facilities-based competitors have market dominance. The facilities of the ILECs are typically the only means to reach most businesses with broadband IP connections and they represent a potential "bottleneck" to competitors of ILEC-provided IP-enabled applications, including VoIP.

Thus, while CompTel does not necessarily advocate the regulation of the IP-enabled offerings of the ILECs directly, it does advocate regulations ensuring that ILECs cannot use their underlying facilities in such a way as to distort the marketplace for IP-enabled offerings. In the current environment, ILECs, and the RBOCs in particularly, retain significant market power and their underlying network facilities should remain subject to regulation, particular non-discriminatory access, even if the IP-enabled services they are providing are not.

---

25 47 U.S.C. § 153(20) (emphasis supplied).

26 *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, 14 FCC Rcd 4289 ¶8 (1999).

Conversely, the Commission should not make the mistake of assuming that the promise of VoIP and other IP-enabled applications will be achieved only if ILECs are allowed to enter the field without controls placed on their market power in underlying transmission facilities. Innovations in the area of IP-enabled applications have consistently come from new entrants, not the incumbents local exchange companies. Significantly, these innovations have come, and are accelerating, without the grant of the types of relief for which ILECs have petitioned in the area of advanced and broadband services, putting to the lie their arguments that such relief is necessary for the benefit of consumers. If anything, the existing petitions often serve to demonstrate the necessity of continuing to ensure access to the underlying facilities of the ILECs by providers of IP-enabled applications, not to mention competitive telecommunications carriers. The failure to ensure access to the underlying facilities of the ILECs creates the very real specter that IP-enabled applications of the ILECs' competitors will not have the ILEC's network facilities as the underlying component but that the ILECs' IP-enabled applications themselves will become the underlying component of any competitors' offerings. In short, absent regulation of access to the ILECs' underlying facilities, competitive providers will be limited to reselling, and perhaps enhancing, ILEC IP-enabled applications. The dominant position this result would allow ILECs to assume in the information services marketplace – and the need to avoid that result – should be obvious.

The dangers to competition presented by failure to regulate the underlying networks of dominant ILECs are illustrated, for example, by the Petition for Forbearance filed by SBC Communications, Inc. seeking forbearance for a broad class of what SBC calls "IP platform

services."[27] SBC seeks to leverage the Commission's national policy of deregulation, which CompTel urges should be continued, in a manner that would escape Title II regulation for, potentially, large parts of SBC's underlying network facilities used to provide local exchange, exchange access, and now long-distance services. While the Commission should, as argued above, continue, in effect, its hands-off policies towards IP-enabled applications, it must remain particularly vigilant not only of efforts by the RBOCs and other ILECs to integrate their underlying network facilities with IP-enabled applications in a way that could damage the competitive landscape for IP-enabled applications, but also of efforts by these dominant carriers to use the facile application of IP technologies as a Trojan Horse to evade regulation of their underlying network facilities upon which their competitors, both telecommunications and information services, rely upon for access.

In making decisions in this proceeding to regulate, the Commission should, to the extent possible, focus regulations solely on the facilities-based components of IP-enabled services, and only where the provider of the IP-enabled services also controls the underlying network facilities. Where the provider of IP-enabled applications leases or purchases underlying telecommunications services or facilities, the Commission should not consider any regulation of that provider. Specifically,

i. The Commission should ensure that the regulatory decisions affecting facilities used to provide IP-enabled applications do not inadvertently relax access to loops, transport, and other bottleneck network facilities to which ILECs may otherwise be required to provide access under Sections 251, 271, or state law, or to which providers of IP-enabled applications need access on a non-discriminatory basis in order to preserve a competitive information services marketplace.

---

[27] Petition of SBC Communications Inc. for Forbearance from Application of Title II Common Carrier Regulations to "IP Platform Services," WC Docket No. 04-29 (Feb. 5, 2004).

ii. The Commission should not allow ILEC ventures into IP-enabled services lead to premature removal of regulation of ILEC retail or wholesale service offerings.

iii. The Commission should also closely monitor the vertical integration of ILEC and other facilities-based broadband services with IP-enabled services offerings, where such integration creates the potential for reducing competition in the IP-enabled applications marketplace.

By advocating this degree of regulation of ILEC network facilities to promote a competitive IP-enabled applications marketplace, CompTel does not mean to suggest that all facilities-based carriers that provide IP-enabled applications should be subject to a uniform level of regulation regarding their underlying networks. Rather, only those facilities-based carriers with substantial market power, *i.e.*, most ILECs, should be governed by such regulations. The Commission in the past has used its forbearance authority to employ distinct tiers of regulation for various subsets of facilities-based providers of service, as in the *Competitive Carrier Proceedings* of the 1980s. The Commission's current forbearance authority, under Section 10 of the Act, can be applied to different classes of telecommunications carriers, and need not be applied indiscriminately to all telecommunications carriers.[28] The Act itself identifies both RBOCs and ILECs as distinct classes of carriers among all local exchange carriers or, more broadly, telecommunications carriers,[29] so use of the Commission's forbearance authority to distinguish between ILEC network and facilities to achieve the important national objectives advocated here and underlying the Commission's historical hands-off policies regarding IP-enabled and other enhanced applications is permissible, as well as appropriate.

---

28 *See* 47 U.S.C. § 160(c).

29 *See, generally*, 47 U.S.C. §§ 251(b)-(c) & 271.

V. TRAFFIC CARRYING IP-BASED APPLICATIONS SHOULD BE EXCHANGED BETWEEN CARRIERS ON A RECIPROCAL COMPENSATION BASIS UNTIL THE *INTERCARRIER COMPENSATION PROCEEDING* IS COMPLETED

Communications traffic carrying IP-enabled applications (or handed off from the Internet or an IP-based network) should be treated in the same manner as reciprocal compensation traffic. Effectively that is the situation today: this traffic is either exchanged as Section 251(b)(5) traffic or simply treated on a bill and keep basis, and this is consistent with the current treatment of Internet-bound traffic. Similarly, carriers that carry information service provider or IP-enabled traffic to other carriers should be allowed to exchange traffic under similar conditions.

In its *ISP Remand Order*, the Commission held that, until the *Intercarrier Compensation* proceeding is completed, Internet-bound traffic, in general, should be treated on a bill-and-keep basis unless pre-existing interconnection agreements subject it to actual compensation.[30] Similarly here, with respect to IP-communications, co-carrier interconnection trunks should remain available to originate or terminate IP communications between carriers. The IP communications traffic should otherwise be treated in the same way as Internet-bound traffic, which is subject to bill-and-keep or reciprocal compensation, depending upon the language of the interconnection agreements

For calls coming off an IP network and onto the public switched network, there are no objectively distinguishable call characteristics that would allow a terminating LEC to practicably treat certain types of IP-PSTN traffic differently than others. Only by treating all IP-enabled communications in the same way, can the Commission ensure that IP-enabled

---

30 *Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) *reversed in part of other grounds and remanded sub nom, WorldCom Inc. v. FCC,* 288 F.3d 429 (D.C. Cir. 2002).

applications are not inefficiently forced to submit to a compensation regime not designed for such traffic. If that were to happen, it could hamper or roll-back the development of IP-enabled applications.

A different compensation mechanism would not be justified. ILECs have failed to demonstrate that they are not adequately compensated for the termination (and origination) of IP-enabled communications traffic today, even without access charges. That being said, CompTel supports a rapid move toward a unified intercarrier compensation scheme. Such issues affecting traffic carrying IP-enabled applications are best resolved in the *Intercarrier Compensation Proceeding*, where they can be examined in the broader context of intercarrier compensation.

VI. NON-ECONOMIC REGULATION SHOULD BE IMPOSED ON PR0VIDERS OF IP-ENABLED SERVICES ONLY WHERE THE COMMISSION HAS JURISDICTION AND INDUSTRY EFFORTS OR THE MARKETPLACE PROVE INEFFICIENT

As argued above, CompTel urges the Commission to refrain generally from regulating IP-enabled applications directly. To the extent economic regulation is required, it should be focused on underlying network facilities of dominant carriers, in order to avoid integration of the network and applications layers in such a way that could injure not only competition in the information services marketplace but also, potentially, in the telecommunications marketplace. However, CompTel recognizes that, in many cases, IP-enabled applications provide voice capabilities and that an increasing number of consumers are looking at such applications as potential replacements improving upon their current use of traditional circuit-switched telephony. In these circumstances, the Commission should remain free to address and take actions regarding social and other policy issues that may be raised by the emergence and market penetration of IP-based communications as an alternative to traditional

voice, data, and video offerings. Thus, for example, the Commission should examine and issue orders, where it has jurisdiction, on matters touching IP-communications such as the universal service fund, E911, other public safety concerns, and communications assistance to law enforcement.

Regarding the universal service fund, providers of IP-enabled applications today contribute significantly, albeit indirectly, to the federal universal service fund through the underlying telecommunications services they incorporate into their offerings. Only in those (presumably very limited) instances where the Commission may treat IP-enabled applications as telecommunications services should providers of IP-enabled services have a different obligation *vis-à-vis* the universal service fund than they do today.[31] Alternatively, if the Commission were to revamp the structure of the universal service fund, which is today predicated on gross telecommunications revenues by providers of telecommunications, it should do so in a way that is fair and reasonable across the board and that does not make artificial distinctions between underlying communications networks or platforms. The Commission needs also to ensure that modifications to the universal fund contribution mechanism does not unduly burden providers of IP-enabled applications as both direct and indirect contributors to the universal service fund, due to their incorporation of underlying communications services.

The Commission should encourage the development, as much as possible, of industry adopted and administered or market-driven solutions to social concerns regarding users of IP-enabled applications, such as disability access, consumer protection, emergency 911 service, and law enforcement assistance. Unnecessary regulation in these areas could hamper the continued

---

[31] The Commission should make clear in this rulemaking that in those instances where providers of IP-enabled applications meet the qualifying criteria as eligible telecommunications carriers, they should be able to receive universal services funds as well.

development of IP-enabled applications. Promotion of industry initiatives would allow providers of IP-enabled applications to facilitate the needs to consumers of law enforcement in the most efficient way possible.

Before the Commission can even consider regulating providers of IP-enabled applications in these areas it must first determine whether it has the jurisdictional authority to do so. Although, as discussed above, the Commission has the authority to preempt the states from adopting decisions and regulations that conflict with the national policy of non-regulation of the Internet, and by extension, IP-enabled applications, this does not translate into an authority to regulate affirmatively beyond its express grants of jurisdiction.

Where the Commission does have jurisdiction and considers asserting that jurisdiction to regulate in non-economic areas, the Commission should regulate IP-enabled services in these matters only as truly necessary to protect the public interest. The Commission should take care that the regulations are adapted to the unique nature of the IP-enabled applications to which they apply, rather than taking regulations adopted for different types of services and woodenly applying them to distinct IP-enabled applications. Furthermore, a determination to regulate in any of these non-economic, "social" areas should be divorced entirely from any suggestion that there should be any economic regulation of IP-enabled applications as a result.

VII. CONCLUSION

For the foregoing reasons, the Commission should preserve its policies of promoting Internet supported services and IP-enabled applications, generally, through a minimum of regulation. Where necessary, the Commission should regulate the underlying networks, transport services, and facilities of dominant facilities-based telecommunications carriers to ensure a robust information services marketplace. If necessary, the Commission

should use its forbearance authority under Section 10 of the Act to avoid unnecessarily regulating facilities-based telecommunications, where providers of such telecommunications do not have an opportunity to leverage their provision of underlying telecommunications so as to damage competition in the provision of IP-enabled applications.

Respectfully submitted,

COMPTEL/ASCENT

By: _____
Robert J. Aamoth
Edward A. Yorkgitis, Jr.
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

Jonathan D. Lee
Sr. Vice President, Regulatory Affairs
COMPTEL/ASCENT
1900 M Street, N.W., Suite 800
Washington, DC 20036
(202) 296-6650

Dated: May 28, 2004

CERTIFICATE OF SERVICE

I, Theresa A. Baum, hereby certify that a copy of the foregoing Comments of CompTel/Ascent in WC Docket No. 04-36 was served via e-mail upon the following:

Janice M. Myles
Wireline Competition Bureau
Competition Policy Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Qualex International
445 12th Street, S.W.
Washington, D.C. 20554

Theresa A. Baum